IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1827

DANIEL NEWTON FLICKINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

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The Petitioner, DANIEL NEWTON FLICKINGER, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on or about March 24, 1978 and the order of May 25, 1978 denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc.

OPINION BELOW

The order of the United States Court of Appeals for the Ninth Circuit was filed on or about March 22, 1978 in a reported opinion. A copy of the opinion is attached hereto as Appendix A. On or about May 25, 1978, the United States Court of Appeals for the Ninth Circuit additionally denied Petitioner's Motion for Rehearing and rejected Petitioner's Suggestion for a Rehearing En Banc. A copy of said order of May 25, 1978 is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly ruled that exigent circumstances existed to entitle federal law enforcement officers with probable cause for a felony arrest to enter a private residence of a suspect's home without a warrant and to make an arrest.

2. Whether the Court of Appeals erred in applying a "clearly erroneous" standard to the issue of exigent circumstances as opposed to a constitutional standard of law of probable cause.

3. Assuming arguendo that exigent circumstances were absent must federal law enforcement officers even with probable cause for a felony arrest obtain a warrant before entering a suspect's private residence to make the arrest.

STATUTORY PROVISIONS INVOLVED

Petitioner respectfully submits that constitutional issues of law and not statutory provisions are specifically at issue herein.

STATEMENT OF THE CASE

In June of 1975, agents of the Drug Enforcement Administration began surveillance of Petitioner FLICKINGER and several other individuals, MUNIER, McLAUGHLIN and HAYDUK. At the same time that the surveillance on the individuals was being maintained, surveillance was also being conducted on several vehicles, including two Chevrolet Suburbans and a Pick-Up Truck. On July 11, 1975, one of the Suburbans was observed to be fitted with desert-like tires and also on that date, Mr. McLAUGHLIN was seen working on a pick-up truck in front of the FLICKINGER home. On July 16, 1975, Mr. FLICKINGER and Mr. MUNIER were observed in FLICKINGER'S Suburban traveling to McCarran Airport in Las Vegas, Nevada. At the Airport, they parked next to FLICKINGER'S Piper Navajo Aircraft and transferred several boxes from the vehicle to the plane and from the plane to the vehicle. Mr. MUNIER was then observed to drive away and Mr. FLICKINGER was observed to enter the plane and take off. Later that same day, Mr. FLICKINGER was observed in Tucson, Arizona at an airport. On July 16th, Drug Enforcement Agents followed the pick-up truck occupied by Mr. McLAUGHLIN and Mr. HAYDUK from Las Vegas, Nevada to a dry lake bed in

Eastern California known as Hidden Hills Dry Lake. At the same time, other agents observed the FLICKINGER Suburban as it was being driven by Mr. MUNIER from Las Vegas to Hidden Hills Dry Lake. The Drug Enforcement Agents were later joined by Mr. LARRY GUY, an Agent with the Federal Communications Commission who entered the case at the request of the Drug Enforcement Administration to determine what violations if any were being committed against Federal Communications Law. Mr. GUY had with him certain radio equipment designed for interception and location of radio transmissions.

On July 17, 1975, Mr. MUNIER was observed again driving the FLICKINGER Suburban to a public telephone. As a result of Mr. GUY'S interceptions, the following conversation was overheard "ah it looks like its going on for tonight he called Susan last night." FLICKINGER'S wife's name was SUSAN.

Between the hours of 11:00 P.M. on July 17, 1975 and 1:00 A.M. on July 18, 1975, Mr. GUY intercepted a series of transmissions between FLICKINGER'S Suburban which were transmitted earlier in the day and a second vehicle on the Lake Bed. The following interception was also obtained "ah I didn't get that DAN was talking . . . DAN told us to try to cover up his tracks and in the process we wound up getting lost. We lost his tracks and a just can't tell nothing out here . . .". FLICKINGER'S name is DANIEL. At approximately 11:00 P.M., one of the Drug Enforcement Agents who was conducting the surveillance of the area believed he heard an airplane and at approximately 1:00 A.M., FLICKINGER'S Suburban and the pick-up truck left the area in different directions. From a

review of the GUY tapes, the agents determined that an airplane drop had been made. One of the agents, Agent BOWE, called Agent JEZZENY at McCarran Airport in Las Vegas, Nevada. JEZZENY reported that just prior to receiving the call, he had observed DANIEL FLICKINGER land his plane. A request was thereafter put out to stop and seize the vehicles above mentioned. The pick-up truck was stopped and McLAUGHLIN and HAYDUK were apprehended by officers at 4:03 A.M. in Nevada on July 18, 1975. Pursuant to a search, 31 sacks of Marijuana were found in the vehicle and McLAUGHLIN and HAYDUK were placed under arrest.

After FLICKINGER had left McCarran Airport, Agent JEZZENY attempted to locate him and at approximately 2:45 A.M. observed FLICKINGER'S Suburban parked in front of the FLICKINGER residence. Agent JEZZENY thereafter returned to the Drug Enforcement Administration Office in Las Vegas and at 5:30 A.M. returned to the FLICKINGER residence where he met a second agent. The FLICKINGER home was thereafter placed under surveillance until approximately 6:30 A.M. at which time the agents knocked on the door and initially announced that they were from Western Union and eventually announced that they were from the Drug Enforcement Administration. Subsequently they entered the house and arrested FLICKINGER, MUNIER and SUSAN FLICKINGER. After being placed under arrest, FLICKINGER made several statements to arresting agents, all directly resulting from the arrest and all incriminating. At the time of the arrest, the agents did not have an arrest warrant nor was there any attempt to obtain an arrest warrant prior to the entry of the home.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND COURT OF APPEALS ERRED IN FINDING THAT EXIGENT CIRCUMSTANCES EXISTED TO ENTITLE FEDERAL LAW ENFORCEMENT OFFICERS WITH PROBABLE CAUSE FOR A FELONY ARREST TO ENTER A PRIVATE RESIDENCE OF A SUSPECT'S HOME WITHOUT A WARRANT AND TO MAKE AN ARREST AND CONDUCT A SEARCH.

Both the District Court and the Court of Appeals found that exigent circumstances existed in the case at bar to such an extent as to excuse the federal agents in not attempting to obtain and in not obtaining a warrant of arrest for the Petitioner. Several factors were pointed out respectfully by the Court of Appeals. The Government initially maintained that there was a risk of destruction of evidence even though Agent JEZZENY had located the FLICKINGER Suburban parked in front of Mr. FLICKINGER'S residence at approximately 2:45 A.M. and did not enter the residence without a warrant until 6:30 A.M. The Court of Appeals additionally placed significance on the fact that FLICKINGER'S Suburban was parked in front of the house and that from this, the conclusion could be drawn that there was evidence on the premises. The Government also maintains that there was a possibility of a warning telephone call being placed by those individuals who were already under arrest and that the occupants of the residence would be placed on notice

of their danger and would be likely to destroy the evidence. Again the other individuals were arrested shortly after 4:00 A.M. and the arrest of Petitioner did not take place until after 6:30 A.M. even after federal agents had placed the residence under surveillance for a period in excess of one hour.

The Court of Appeals also recognized the Government's argument that a certain risk of danger to the arresting officers or to third persons existed in the case at bar, although the Court of Appeals also specifically recognized that marijuana smuggling is not necessarily a crime of violence and additionally, in the case at bar, there was no evidence of violence. It should further be noted that the obtaining of a warrant would not have lessened the risk. It is respectfully submitted that the exigent circumstances pointed out both by the Government and apparently agreed to by the District Court and Court of Appeals were insufficient to justify a warrantless arrest; particularly when viewed in conjunction with the standard of review (see II below).

II.

THE COURT OF APPEALS ERRED IN APPLYING A "CLEARLY ERRONEOUS" STANDARD TO THE ISSUE OF EXIGENT CIRCUMSTANCES AS OPPOSED TO A CONSTITUTIONAL STANDARD OF PROBABLE CAUSE.

The Court of Appeals specifically acknowledged that no case had been brought to their attention deciding the question as to what standard of review is applicable

to a situation of exigent circumstances. By way of analogy, however, the case of *United States v. Hart*, 456 F.2d, 798 (9th Cir., 1976) (En Banc) *Cert. denied Sub. Nom. Robles v. United States*, 429 U.S. 1120 (1977) was cited wherein the Ninth Circuit Court of Appeals concluded that the determination that police officers had done everything reasonably necessary and proper to make a witness available was factual in nature and that the standard of review was by the clearly erroneous standard. In effect, the Court of Appeals agreed that a factual analysis was needed as opposed to a legal test subject to constitutional dimensions. Accordingly, the Court of Appeals held that the proper standard of review for a finding regarding exigent circumstances is whether the finding was clearly erroneous. It is respectfully suggested that such a finding was error particularly in light of *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1108 (9th Cir., 1976) where it was held that "we are required to review the determination of probable cause . . . as an application of a rule of law." *See also, Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). The Court of Appeals in footnote three noted at Page 13 of their opinion, acknowledged that it was not clear as to whether a clearly erroneous standard should be used as opposed to a constitutional test.

It is respectfully submitted that the use of the clearly erroneous standard was error based on the facts of the instant case since the standard is used to justify a warrantless search situation where no attempt has been made to obtain a warrant and where there was probable cause for the arrest.

III.

ASSUMING ARGUENDO THAT EXIGENT CIRCUMSTANCES WERE ABSENT AND/OR A WRONG STANDARD WAS APPLIED FEDERAL LAW ENFORCEMENT OFFICERS WITH PROBABLE CAUSE FOR A FELONY ARREST MUST OBTAIN A WARRANT BEFORE ENTERING A SUSPECT'S PRIVATE RESIDENCE WHEN THEY HAVE PROBABLE CAUSE FOR A FELONY ARREST.

It is respectfully submitted that this Honorable Court has not yet ruled on the issue of where exigent circumstances do not exist must federal law enforcement officers with probable cause for a felony arrest obtain a warrant before entering a suspect's home to make the arrest. At least one Circuit Court of Appeals had now held that absent exigent circumstances, a warrant must be obtained before entering a suspect's home. This issue was of course left open in the case of *United States v. Watson*, 423 U.S. 411, 18 Cr.Law 3051. In *United States v. Reed*, 23 Cr.Law 2097 (2nd Cir. 4/11/78), the Court held that drug enforcement agents who failed to take advantage of an opportunity to obtain a warrant before entering a heroin sale suspect's apartment to arrest her and her partner violated the Fourth Amendment. No decision of the Ninth Circuit Court of Appeals has resolved this issue which was left open not only in the *Watson* case but in the case of *United States v. McLaughlin*, 525 F.2d 517 (9th Cir., 1975).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this 23rd day of June, 1978, postage prepaid, to the Honorable Wade H. McCree, Jr., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

FILED
MAR 2 4 1978
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- DANIEL NEWTON FLICKINGER, Defendant-Appellant.	No. 76-2656
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JOHN H. MUNIER, JR., Defendant-Appellant.	No. 76-2989
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- ROBERT WILLIAM McLAUGHLIN, Defendant-Appellant.	No. 76-3483
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- STANLEY DAVID HAYDUK, Defendant-Appellant.	No. 76-2655

OPINION

Appeal from the United States District Court for the District of Nevada

Before: KOELSCH, DUNIWAY and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Flickinger, Munier, McLaughlin and Hayduk were each convicted following a non-jury trial of conspiracy to import a controlled substance and to possess a controlled substance in violation of 21 U.S.C. §§841(a)(1), 846, 952 and 963; importation of a controlled substance in violation of 21 U.S.C. §952(a) and 18 U.S.C. §2; and possession of a controlled substance with intent to distribute in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. On appeal, they raise several contentions concerning the admission of evidence at trial. They also challenge the validity of the indictment under which they were charged. We affirm.

I.

In late June 1975, agents of the Drug Enforcement Administration (DEA) began a surveillance of Flickinger and his Chevrolet Suburban. The surveillance was soon broadened to include three additional individuals, Munier, McLaughlin, and Hayduk, and two additional vehicles, another Chevrolet Suburban (the second Suburban) and a white pickup truck fitted with a camper top.

On July 11 and 12, DEA agents observed a series of events pertaining to the two Suburbans and the pickup. On July 11, Flickinger, Munier, and McLaughlin were

seen taking the second Suburban to a tire store in Las Vegas where it was fitted with wide desert-type tires. Later that same day, Munier was seen at another tire store in Las Vegas with Flickinger's Suburban. That vehicle was also fitted with desert-type tires. Also on the 11th, McLaughlin was seen working on the pickup in front of Flickinger's Las Vegas home, apparently installing an aerial.

On the 12th McLaughlin and Hayduk were observed taking the pickup to various businesses in Las Vegas. At one location, a lumber store, they were observed installing plywood in the bed of the pickup. Later that day, DEA agents saw McLaughlin and Hayduk painting the doors of the pickup.

The next significant event occurred on July 16, when Flickinger and Munier were observed in Flickinger's Suburban traveling from his home to McCarran Airport in Las Vegas. At the airport, they parked next to Flickinger's Piper Navajo aircraft and transferred boxes from the vehicle to the plane and from the plane to the vehicle. Subsequently, Munier drove away and Flickinger entered the plane and took off.

Later in the day, Flickinger was observed at the Tucson, Arizona, airport. Susan Caron, a sales person at the airport, saw Flickinger pay for gasoline for his aircraft and purchase aeronautical maps for Mexico. Caron also noted that at the time of the purchases, Flickinger was accompanied by a man of Mexican appearance. Through a DEA agent who interviewed Caron, the information concerning Flickinger's stay in Tucson was relayed to agents in Las Vegas.

Still later on the same day, DEA agents followed the pickup occupied by McLaughlin and Hayduk from Las Vegas to a dry lake bed in eastern California known as

Hidden Hills Dry Lake. Approximately the same time, other agents in separate vehicles followed Flickinger's Suburban as it was driven by Munier from Las Vegas to Hidden Hills Dry Lake.

That evening DEA agents, who had taken up positions at various locations around the lake for purposes of surveillance, were joined by Larry Guy, an agent with the Federal Communications Commission (FCC), who entered the case at the request of a DEA agent to determine if there might be any violations of the federal communications laws. Guy brought radio equipment designed for interception and location of radio transmissions.

There was no activity at Hidden Hills Dry Lake until approximately noon on July 17, when Munier was seen in Flickinger's Suburban driving up to a public phone in the area. Soon after Munier left the phone booth, Guy intercepted a radio transmission which included the following language:

> "Ah, it looks like it's on for tonight. He called Susan last night."

Flickinger's wife's name is Susan. Through the use of his equipment, Guy was able to determine that the transmission signal came from Flickinger's Suburban parked next to the public phone.

Approximately 8:00 p.m., McLaughlin and Hayduk, who had previously left the lake bed for a small town in the area, returned to the lake. Munier arrived at the lake approximately the same time. Nothing eventful occurred until 11:00 p.m. when Guy began to pick up radio transmissions. Between the hours of 11:00 p.m. on July 17 and 1:00 a.m. on July 18, Guy intercepted a series of transmissions between Flickinger's Suburban,

which had transmitted earlier in the day, and a second vehicle on the lake bed. Included in the transmissions were certain critical statements. At one point, the voice which Guy had heard earlier in the day stated:

> "Ah, I didn't get that, Dan was talking."

At another point, a second voice stated:

> "Dan told us to try to cover up his tracks and in the process we wound up getting lost; we lost his tracks and a just can't tell nothing out here. . . ."

Flickinger's first name is Daniel. Approximately 11:00 p.m., one of the DEA agents who was conducting surveillance of the area believed that he heard an airplane.

Approximately 1:00 a.m., Flickinger's Suburban and the pickup left the area in different directions. The agents then met and listened to the tape recordings which Guy had made of the radio transmissions. From the tapes, the agents determined that an airplane drop had been made. Agent Bowe, who was at the lake bed, called Agent Jezzeny at McCarran Airport in Las Vegas. Jezzeny reported that just prior to receiving this call, he observed Flickinger land his plane. Based on information from the tapes, the statement from Agent Jezzeny, and the information derived from the earlier surveillance, Agent Bowe called California and Nevada authorities, requesting them to stop and seize the vehicles. The DEA agents then left in pursuit of the vehicles.

The pickup was stopped and McLaughlin and Hayduk were apprehended by officers of the Nye County, Nevada, sheriff's department approximately 4:03 a.m.

on July [illegible]. The vehicle was taken to the sheriff's office in Tonopah, Nevada, where it was searched and found to contain 31 sacks of marijuana. McLaughlin and Hayduk were then arrested.

After Flickinger left McCarran Airport, Agent Jezzeny attempted to locate him and about 2:45 a.m. observed Flickinger's Suburban parked in front of Flickinger's home. Jezzeny then went to the DEA office in Las Vegas.

About 5:30 a.m., Agent Jezzeny returned to Flickinger's where he met a second agent. At that time, because of a phone call from another agent, both agents knew that McLaughlin and Hayduk were in custody and that the marijuana had been found in the pickup. The two agents placed Flickinger's home under surveillance until two more agents arrived approximately 6:30 a.m. The agents then knocked on the front door, announced that they were from Western Union, then announced that they were from the DEA. Subsequently, they entered the house and arrested Flickinger, Munier, and Susan Flickinger. After being placed under arrest, Flickinger made several statements to the arresting agents, all directly resulting from the arrest and all incriminating. At the time of the arrests, the agents did not have an arrest warrant nor was there any attempt to obtain an arrest warrant prior to the entering of the house.

Subsequent to the arrests, DEA agents searched the aircraft flown by Flickinger. Three days later, the aircraft was searched a second time. Incriminating evidence was found during these searches.

Other important evidence was developed by FCC Agent Guy. On the day of the arrests, Guy interviewed Flickinger and Munier in the Clark County Jail in Las

Vegas regarding possible violations of FCC regulations. Several days later, Guy again went to the Clark County Jail, this time to interview McLaughlin and Hayduk, who had been transferred there after their initial arrest at Tonopah. During the course of these two interviews, Guy recognized the voice of Munier as the first voice and that of McLaughlin as the second voice which he had heard during the radio transmission surveillance at Hidden Hills Dry Lake.

Flickinger, Munier, McLaughlin, and Hayduk were first charged by complaint dated July 18, 1975, with possession of a controlled substance with intent to distribute. The complaint was filed in the United States District Court for the District of Nevada. Subsequently, the four defendants were indicted and charged with conspiracy to import a controlled substance and importation in the United States District Court for the Eastern District of California. A change of venue motion was granted and the case was transferred back to Nevada. Thereafter, the four were charged with the three-count indictment on which their present convictions are based. The two-count indictment was dismissed and the case was tried to the district judge sitting without a jury, resulting in guilty judgments on all three counts.

II.

All four urge that the warrantless arrests of Flickinger and Munier were violative of the Fourth Amendment. Accordingly, it is contended, the statements elicited from Flickinger at the time of his arrest were

erroneously admitted into evidence. Because of our disposition of this issue, it is unnecessary for us to determine whether any of the four, other than Flickinger, has standing to complain.

In order to arrive at the conclusion that Flickinger's statements were properly admitted into evidence, we must analyze whether the entry and arrest were valid. Flickinger admits that there was probable cause to effect the arrest. We agree. However, this does not resolve the problem. Although the Supreme Court has held that a warrantless felony arrest in a public place is valid based solely upon probable cause, *United States v. Watson*, 423 U.S. 411 (1976), neither the Supreme Court, *id.* at 432-33 (Powell, J., concurring; Stewart, J., concurring); *United States v. Santana*, ____ U.S. ____, ____ (Marshall, J., dissenting), nor our circuit, *United States v. McLaughlin*, 525 F.2d 517, 520 (9th Cir. 1975), have reached the issue whether probable cause to arrest is sufficient by itself to justify a warrantless entry into a private place, particularly a private residence, in order to effect a warrantless arrest. In several cases, this issue was not reached because the facts indicated that there were exigent circumstances which justified the failure to obtain an arrest warrant. *United States v. McLaughlin, supra*, 525 F.2d 517; *United States v. Curran*, 498 F.2d 30 (9th Cir. 1974); *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). We should therefore first determine whether there were any such exigent circumstances.

Ordinarily, exigency does not evolve from one single fact. Indeed, we are often confronted with a mosaic—no one part of which is itself sufficient. Our task is to

review the totality of the circumstances to determine if the finding of exigency was proper.

First, the government argues that there was a risk of destruction of evidence in this case which demanded immediate action and justified the failure to obtain a warrant. Specifically, it is argued that because Flickinger was seen by Agent Jezzeny carrying a briefcase from the plane following his landing at McCarran Airport, the DEA agents could reasonably believe that he had brought evidence into his home. The government also seems to argue that because Flickinger's Suburban, which had been seen at Hidden Hills Dry Lake, was parked in front of Flickinger's home, there was a likelihood that evidence had been brought into the house from the Suburban. Both events, the government contends, indicate that the DEA agents could have reasonably determined that the evidence might be destroyed if they delayed in arresting the occupants of the house.

Admittedly, the observation of Flickinger carrying a briefcase is insufficient alone to demonstrate exigency. A standard for exigent circumstances which permitted avoidance of the warrant requirement on such a low level of probability would completely obviate the need for a warrant at any time, for in every case where an individual is suspected of participating in a crime there is a possibility that he might have taken evidence of some kind with him upon leaving the scene of the crime.

The more significant observation was of Flickinger's Suburban parked in front of the house. Based on the earlier surveillance, the substance of the citizen band radio conversation, and the timing of the departure of

the vehicles at Hidden Hills Dry Lake as compared with Flickinger's landing at McCarran Airport, the DEA agents could reasonably believe that the two vehicles leaving the lake bed contained contraband. Therefore, upon viewing one of those vehicles in front of Flickinger's home, the agents could reasonably believe that there was evidence on the premises. The critical question is whether that evidence was in imminent danger of being destroyed. It is true that from 5:30 a.m., when surveillance began, until 6:30 a.m., when the agents knocked on the door, there was no sign that anyone was awake in the house. Apart from the possibility of a warning telephone call, the agents had no specific reason to believe that the occupants were on notice of their danger and were likely to destroy evidence absent immediate arrest.

A second type of exigency urged by the government involves risk of danger to the arresting officers or to third persons. Where the crime on which the arrest is based is a crime of violence or the suspect is reasonably believed to be armed, the increased danger to the community and to the arresting officers justifies the avoidance of delay involved in obtaining a warrant. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). However, marijuana smuggling is not necessarily a crime of violence and there was no evidence of violence in this case. In addition, there was no indication that any of the people in the house were in possession of weapons.

We are not unsympathetic with the government's premise that "anytime agents seek to effect an arrest or search of a residence, with or without a warrant, the possibility that persons inside might have access to

weapons is very real and sometimes critical." Followed to its logical conclusion, however, the government's contention would obviate the necessity for a warrant in any arrest in a residence because every such arrest would involve the potential use of weapons. While we are critically mindful of the need for protection of arresting officers, we cannot accept the full thrust of the government's argument.

The term "exigent circumstances," in conjunction with an arrest in a residence, refers to a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. Such is the case where police know or reasonably believe that a suspect is armed, for quick action increases the likelihood that the suspect may be disarmed without injuring others. On the other hand, when the police do not have a reasonable basis for believing the suspect is armed beyond his alleged participation in non-violent criminal activity, that fact alone is insufficient to demonstrate exigency.

The government also argues that there was a risk that the occupants of the house could escape absent immediate action which justified the warrantless entry. Where there is such a danger, the police may act immediately to effect a warrantless arrest. *United States v. McLaughlin, supra*, 525 F.2d at 521; *United States v. Bustamante-Gamez, supra*, 488 F.2d at 8-9. In this case, however, this argument alone is insufficient. Throughout the continuous, one hour early-morning surveillance of the house prior to the entry and arrest, there was no sign that any of the occupants were awake.

The government's final argument is that because McLaughlin and Hayduk had been arrested approximately two and one-half hours earlier, there was a

danger that Flickinger and Munier might be advised of the arrests and of their own danger. In some cases we have treated the suspect's knowledge that he is at risk of immediate apprehension as an exigent circumstance justifying immediate action. *United States v. McLaughlin, supra,* 525 F.2d at 521; *United States v. Curran, supra,* 498 F.2d at 35-36; *United States v. Bustamante-Gamez, supra,* 488 F.2d at 8-9. This is appropriate, for such knowledge substantially aggravates each of the exigencies already discussed. A suspect who realizes that he is in danger of immediate apprehension is clearly more likely to destroy evidence, to attempt an escape, or to engage in armed resistance than is a suspect who is taken unawares. By acting promptly, however, the police can substantially mitigate the possibility of such occurrences.

The alternative to immediate action may be that the police would take escalated precautionary measures while awaiting the warrant in order to guarantee that the suspect could not escape and to assure their own safety. This may include cordoning off the residence. Such measures, while appropriate in some cases, may carry their own unacceptable dangers, *i.e.*, a heightened risk of weapons play and danger to third parties. *Compare United States v. McLaughlin, supra,* 525 F.2d at 521 *with United States v. Calhoun,* 542 F.2d 1094, 1102 (9th Cir. 1976); *United States v. Bustamante-Gamez, supra,* 488 F.2d at 9.

Accordingly, this consideration is a critical part of the case. It would not be unreasonable for the DEA officers to fear that a warning telephone call would come to the Flickinger home from McLaughlin and Hayduk or from someone they would contact. In

addition, the agents could reasonably believe that some or all of the large quantity of marijuana was to be delivered to additional unknown confederates. Not knowing when the marijuana was due at its next destination, the agents could reasonably conclude that a concerned prospective recipient might alert Flickinger that the delivery was overdue and thus had possibly been intercepted.[1] Moreover, such an alerting telephone call would, of course, activate the standard exigencies discussed above: escape, destruction of evidence, and danger of violence. *See United States v. Evans,* 481 F.2d 990, 993 (9th Cir. 1973).

Reviewing the totality of all the circumstances leads us to conclude that there is a close question as to exigency. The district judge, after hearing the evidence and oral argument, thought the question deserved his study of a written transcript and special briefs. It was only after reviewing this material that the district judge concluded that there were exigencies sufficient to justify an arrest without a warrant.

We turn first to the question of what standard of review is applicable to this issue. While no case from our circuit has been called to our attention deciding the precise question, we have decided analogous issues. For example, in *United States v. Hart,* 546 F.2d 798, 801-02 (9th Cir. 1976) (en banc), *cert. denied, sub. nom. Robles v. United States,* 429 U.S. 1120 (1977), we concluded that the determination that police officers had done everything "reasonably necessary and proper" to make a witness available was factual in

[1] That such a telephone call could reasonably be expected is amply demonstrated by the district judge's finding that Flickinger's home was "the smuggling headquarters."

nature and our review was by the clearly erroneous standard.

In *United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1962), we held similarly that whether consent was "freely and intelligently given" and that there was "no duress or coercion, express or implied" was a factual issue to be tested by the clearly erroneous standard. *See also, United States v. Lemon*, 550 F.2d 467, 472 (9th Cir. 1977), and *United States v. Tolias*, 548 F.2d 277, 278 (9th Cir. 1977).[2]

Our experience dictates that the question of exigent circumstances is fundamentally the same type of issue as the questions of voluntariness of a consent and whether officers had done everything reasonably necessary to produce a witness. Certainly, a finding of exigent circumstances is no less based on the "fact-finding tribunal's experience with the mainsprings of human conduct." *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960); *see Lundgren v. Freeman*, 307 F.2d

[2]We have recently indicated that the proper standard of review for the question of probable cause *may* also be clearly erroneous. *See* United States v. Thompson, 558 F.2d 522, 524-25 (9th Cir. 1977); United States v. Patterson, 492 F.2d 995, 996 (9th Cir.), *cert. denied*, 419 U.S. 846 (1974); Costello v. United States, 324 F.2d 260, 261 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1964). If we have so held, we would be even more persuaded that the finding of exigent circumstances should be tested by the clearly erroneous standard. However, it is not free from doubt that a finding of probable cause is to be so tested. *See* United States v. One Twin Engine Beech Airplane, 533 F.2d 1106, 1108 (9th Cir. 1976). In any event, we deem the issue of exigent circumstances to be more closely related to the mixed fact-law question involved in United States v. Hart, *supra*, 546 F.2d 798, than the ultimate constitutional standard of probable cause. *See* Ker v. California, 374 U.S. 23, 33 (1963).

104, 115 (9th Cir. 1962); *United States v. Hart, supra*, 546 F.2d at 802. Accordingly, we hold that the proper standard of review of a finding regarding exigent circumstances is whether the finding was clearly erroneous.[3]

Guidance for the application of the clearly erroneous test was amply given by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969):

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Applying this test to the case before us, we cannot say we are left with a "definite and firm conviction that a mistake has been committed." Although the issue is close and segmenting the various circumstances may

[3]The District of Columbia circuit has apparently also held that the appropriate test is whether the finding is clearly erroneous. *See* United States v. Bradshaw, 515 F.2d 360, 365 (D.C. Cir. 1975); *but cf.* United States v. Gargotto, 510 F.2d 409, 411 (6th Cir. 1974).

show weakness in some, the factors taken as a whole are sufficient to meet the appellate test. Therefore, we conclude that the admitted probable cause plus the exigent circumstances validate the warrantless arrest and we, therefore, need not address the question of whether a warrantless arrest in a home based only upon probable cause is valid.

III.

McLaughlin argues that the warrantless seizures and searches of the pickup and Flickinger's aircraft were violative of his Fourth Amendment rights. Accordingly, it is contended, all resulting evidence should be suppressed. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Flickinger, Munier and Hayduk adopt McLaughlin's argument.[4]

Probable cause for the searches and seizures is not challenged. We hold that they were clearly valid under the "moving vehicle" exception to the normal warrant requirement. Under this exception, a vehicle may be stopped and searched solely on probable cause. *United States v. Carroll*, 267 U.S. 132 (1925). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971); *Chambers v. Maroney*, 399 U.S. 42, 46-52 (1970). The need for a search warrant is excused by the exigent circumstances that the vehicle is "movable, the occupants are alerted, and the car's contents may never

[4]It is unnecessary to complicate our disposition by ferreting out the obvious standing problems. Suffice it to say that at least one defendant has standing to complain pertaining to each search.

be found again if a warrant must be obtained." *Chambers v. Maroney, supra*, 399 U.S. at 51.

IV.

Flickinger, McLaughlin and Hayduk adopt Munier's argument that the court erred in admitting the testimony of FCC Agent Guy, who stated that the voices in the taped CB conversations were those of Munier and McLaughlin. They contend that the testimony should have been suppressed because of the impermissibly suggestive way in which the identification was made. In particular they point out that the identification was made without a line-up and that Guy seemed to know their names prior to the identification.

In *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court considered the scope of due process protection against admission of evidence derived from pretrial identification procedures. The Court held that such evidence was not admissible where "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." *Id.* at 301-02. In making this determination, it is necessary to examine the "totality of the circumstances." *Id.* at 302. Although this test was enunciated with regard to a visual identification, it is equally applicable to a voice identification.

Here, we find that the procedures used by Guy were unnecessarily suggestive. Instead of a face-to-face interview, which obviously focuses on one person, a line-up could have been arranged, thereby minimizing the

attention directed to one individual. However, there is no per se rule of exclusion for unnecessarily suggestive identification procedures. *Manson v. Brathwaite*, 45 U.S.L.W. 4681, 4684-85 (U.S. June 16, 1977). *Stovall* suggests a two-part test concerning exclusion of identification testimony by requiring that the procedure be "unnecessarily suggestive *and* conducive to irreparable mistaken identification. . . ." *Stovall v. Denno, supra*, 388 U.S. at 302 (emphasis added). Interpreting this test, the Court has held that the primary issue is the reliability of the identification evidence within the totality of the circumstances. *Manson v. Brathwaite, supra*, 45 U.S.L.W. at 4685.

Here, several factors indicate that the suggestive elements of the identification procedure did not play a role in the actual determination of identity made by Guy. These same factors support the credibility of Guy's determination. First, Guy made it clear that his identification of Munier and McLaughlin was based solely on his own comparison of the two voices he heard and recorded during the CB radio transmission at the lake bed, and the live voices of Munier and McLaughlin. Because of the danger that circumstantial evidence might have focused Guy's suspicion on the jailed suspects, the district judge questioned him carefully on this point.

Second, Guy was experienced in voice identification. He testified that he had had occasion to perform approximately 100 similar voice identifications during the preceding 15 years and that in ten of the cases, he had been called upon to testify in federal court. This experience would ordinarily lead Guy to make the identifications in a careful professional manner, based on the information which was properly before him.

Finally, the original specimen of the voices was on a tape recording. Thus, the specimen was subject to repetition, assuring that Guy was familiar with it when he heard the live voices of the suspects. All of these factors support a conclusion that while there were suggestive elements surrounding the identification, these elements did not affect the actual determination of identity made by Guy. Reviewing the totality of the circumstances, we find that the district judge did not err in concluding that Guy's testimony was admissible.

The case cited for the proposition that the procedures at issue here violated due process is readily distinguishable. In *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966), a rape victim was brought to the police station to listen to the voice of a suspect. Such a procedure is intensely suggestive for, in essence, the police are stating to the victim of a violent crime that the individual under examination was the perpetrator. Because of the aura of professionalism surrounding police officers and the victim's own desire to find the perpetrator, the victim will be under emotional pressure to concur with the judgment of the police. By contrast, the experienced expert witness who is not personally involved in the crime is less likely to be swayed by the judgment of the police. In addition, the expert is aware of his duty to prevent circumstantial evidence from affecting his judgment and may be expected to act in accord with this responsibility.[5]

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[5] Roper v. Beto, 318 F. Supp. 662 (E.D. Tex. 1970), was also cited to us to show the unconstitutionality of the procedures at issue here. The decision of the lower court, however, was reversed on appeal. Roper v. Beto, 454 F.2d 499 (5th Cir. 1971), *cert. denied*, 406 U.S. 948 (1972).

V.

McLaughlin and Hayduk contend that the evidence introduced at trial was not sufficient to support their convictions on the three counts contained in the indictment. Flickinger and Munier join in their arguments.

Taking first the importation count, count 2, the government was required to prove that on or about July 18, 1975, the defendants knowingly and intentionally did import marijuana, a controlled substance, into the United States from Mexico. 21 U.S.C. §952(a). Here, of course, McLaughlin, Munier and Hayduk were not the parties who were alleged to have actually brought the marijuana in from Mexico. They could still be convicted, however, if the government proved that they aided or abetted in the crime. *Nye & Nissen v. United States,* 336 U.S. 613, 618 (1949); 18 U.S.C. §2. To prove aiding and abetting, the government was required to demonstrate that McLaughlin, Munier and Hayduk participated in the crime of importation and by their actions sought to bring about its success. *See Nye & Nissen v. United States, supra,* 336 U.S. at 619.

In determining whether the government met its burden of proof, we review the evidence presented at trial in a light most favorable to the government as the prevailing party. *United States v. Hood,* 493 F.2d 677, 680 (9th Cir.), *cert. denied,* 419 U.S. 852 (1974). Applying that standard of review, we find that the evidence was sufficient to prove guilt of importation beyond a reasonable doubt.

The evidence clearly demonstrates that marijuana, a controlled substance, was imported from Mexico on the

evening of July 17 and that each of the accused took an active role in the importation. The CB transmissions at Hidden Hills Dry Lake, Flickinger's purchase of the aeronautical charts for Mexico, and the fact that Flickinger landed soon after the close of the "drop" conversation indicate that Flickinger was involved in an airplane drop of marijuana imported from Mexico. After Flickinger was arrested on July 18, he stated to the agents that his occupation was a "dope runner" and described how he landed on the dry lake bed. During the process of placing Flickinger under arrest, the DEA agents found a Mexican travel permit in his name dated July 16, 1975, in his possession. In Flickinger's plane was found a portable CB radio, a gas receipt from Mazatlan, Mexico, dated July 17, 1975, and marijuana debris. This evidence clearly shows that Flickinger was involved in the importation of marijuana.

As to Munier, McLaughlin and Hayduk's roles, the evidence shows that they took an active part in the importation. They arrived at the lake bed concurrently and the vehicles in which they were earlier seen were pinpointed as the source of radio transmissions which indicated participation in a drop. The pickup in which McLaughlin and Hayduk were riding contained 31 sacks of marijuana. Based on this evidence, the district judge could have reasonably concluded beyond a reasonable doubt that Flickinger imported marijuana from Mexico and dropped it at the Hidden Hills Dry Lake. The judge could further properly conclude that the imported marijuana was transferred into the pickup truck after the drop and was being transported by McLaughlin and Hayduk at the time of their arrest. Further, he could reasonably conclude that Munier was aiding and abetting in the transaction.

Importation is a specific intent crime, requiring knowing or intentional importing of a controlled substance. Thus, the government was required to prove that the participants knew that the marijuana was imported. We find that the government met its burden of proof. There was direct evidence of Flickinger's knowledge. As to the remaining three, the evidence was circumstantial. However, an inference of criminal intent can be drawn from circumstantial evidence. *United States v. Kaplan*, 554 F.2d 958, 964 (9th Cir. 1977); *United States v. Childs*, 457 F.2d 173, 174 (9th Cir. 1972); *United States v. Oswald*, 441 F.2d 44, 47 (9th Cir. 1971).

The involvement of the participants in all aspects of this saga provides adequate evidence. Not only were all involved in the preparation of the venture, each was involved at the dry lake and actively in communication to further the plan. In addition, the 31 cloth sacks of marijuana were marked with Spanish writing, indicating that the sacks came from Mexico. A reasonable inference from the evidence is that the sacks of marijuana were transferred from the airplane to the pickup.

We find, then, that the evidence was sufficient to uphold the convictions on the importation count. This leaves only the sufficiency of the evidence on the conspiracy count and the count charging possession with intent to distribute. However, each received concurrent sentences on all three counts. Under the concurrent sentence doctrine, a federal appellate court, as a matter of discretion, may decide not to consider arguments advanced by an appellant with regard to one or more counts of an indictment if he was at the same

time validly convicted of other offenses under other counts and concurrent sentences were imposed. *United States v. Pinkus*, 551 F.2d 1155, 1161 (9th Cir. 1977); *United States v. Moore*, 452 F.2d 576, 577 (9th Cir. 1971); *see generally Benton v. Maryland*, 395 U.S. 784, 787-91 (1969). Here, count 2, charging importation, is unassailable. We decline to consider the sufficiency of the evidence with regard to the remaining two counts.

VI.

Hayduk, joined by McLaughlin, Flickinger and Munier, argues that the government was improperly permitted to add indictment counts following the change of venue and therefore impermissibly punished each of them for exercising their right to a change of venue. If the challenge were well taken, it would lead to the dismissal of count 3, charging possession with intent to distribute, which was added following the change of venue, and possibly the dismissal of count 1, charging conspiracy, which was modified following the change of venue. *See United States v. Gerard*, 491 F.2d 1300, 1304-06 (9th Cir. 1974); *United States v. DeMarco*, 401 F. Supp. 505, 512 (C.D. Cal. 1975), *aff'd*, 550 F.2d 1224 (9th Cir. 1977). However, we have already upheld count 2. Under the concurrent sentence doctrine, we decline to consider this challenge to counts 1 and 3.

AFFIRMED.

Judge Koelsch concurs in the result.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 76-2656
-vs-	)	
DANIEL NEWTON FLICKINGER, Defendant-Appellant.	)	**ORDER**

Before: KOELSCH, DUNIWAY and WALLACE, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 77-1827

In the Supreme Court of the United States

OCTOBER TERM, 1978

DANIEL NEWTON FLICKINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 573 F. 2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1978, and a petition for rehearing was denied on May 25, 1978 (Pet. App. 1b). The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exigent circumstances justified the warrantless entry into petitioner's home on probable cause to arrest him for a felony.

2. Whether the court of appeals erred in applying the "clearly erroneous" standard in reviewing the correctness of the district court's finding of exigent circumstances.

STATEMENT

Following a jury-waived trial in the United States District Court for the District of Nevada, petitioner and his co-defendants, John Munier, Robert McLaughlin and Stanley Hayduk, were convicted of conspiracy to import and to possess marijuana, in violation of 21 U.S.C. 846 and 963, importation of marijuana, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, and possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner was sentenced to a concurrent five-year prison term on each count, to be followed by a two-year special parole term. The court of appeals affirmed (Pet. App. 1a-24a).

The evidence adduced at the suppression hearing and at trial showed that on June 23, 1975, an informant told an agent of the Drug Enforcement Administration that during the past month she had seen an aircraft landing at night without landing lights on a dry lake bed in the area of Beatty, Nevada, and that the aircraft had been met by a four-wheel-drive Chevrolet Suburban (S. Tr. 24).[1] After determining that petitioner owned the Suburban and that he was a licensed pilot, the agents began a surveillance of petitioner and his residence in Las Vegas, Nevada (S. Tr. 26-38).

On July 11, 1975, petitioner and co-defendants McLaughlin and Munier equipped petitioner's Suburban and another Suburban with wide "desert type" tires and installed antennas and radio equipment in the other

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[1] "S. Tr." refers to the transcript of the suppression hearing.

Suburban and in a pickup truck (S. Tr. 35-41). On July 12, McLaughlin and Hayduk installed a large piece of plywood in the bed of the pickup (S. Tr. 42-43). Later that day, the two men painted an insignia on the doors of the truck (S. Tr. 45).

On July 16, 1975, petitioner and Munier drove in petitioner's Suburban from petitioner's home to McCarran Airport in Las Vegas, where they transferred boxes from the vehicle into petitioner's twin engine Piper Navajo aircraft and from the plane to the vehicle (S. Tr. 50-52). Munier then drove away in the Suburban and petitioner took off in the airplane (S. Tr. 52-54). Later that same day, petitioner was observed at the Tucson, Arizona, airport, where he and a man of Mexican appearance bought and reviewed aeronautical maps of Mexico (S. Tr. 72-73). Still later that day, McLaughlin and Hayduk, in the pickup, and Munier, in petitioner's Suburban, drove to a dry lake bed (known as Hidden Hills Dry Lake) in eastern California near the Nevada border (S. Tr. 56-59, 62-63).

There was no activity at the dry lake bed until noon the next day, when Munier drove petitioner's Suburban to a phone booth. After Munier left the booth, D.E.A. agents intercepted a radio transmission over the citizen's band radio in petitioner's Suburban, which said in substance that he "called Susan last night and it's on for tonight" (S. Tr. 69-70). (Petitioner's wife is named Susan.) Munier then returned to the lake bed. Between 11:00 p.m. on July 17 and 1:00 a.m. on July 18, the agents intercepted a series of radio transmissions from petitioner's Suburban, including the statement that "Dan told us to cover up his tracks" (S. Tr. 77-78). At approximately 11:00 p.m. on July 17, one of the agents heard an aircraft land at the lake bed, although the plane could not be seen because it was not using its lights (S. Tr. 74-75). Some two hours

later, petitioner's Suburban and the pickup, also with their lights out, drove away from the lake bed in different directions, the pickup toward Tecopa, California, and the Suburban toward Las Vegas (S. Tr. 76-77). At about 1:15 a.m. petitioner and his Mexican companion landed in petitioner's aircraft at McCarran Airport (S. Tr. 78).

At the D.E.A. agents' request, state police officers stopped the pickup truck at about 4:00 a.m., found 1200 pounds of marijuana in the truck, and arrested its occupants, McLaughlin and Hayduk (S. Tr. 79-80). Meanwhile, at approximately 2:45 a.m., D.E.A. agents observed petitioner's Suburban parked in front of his home (Tr. 672).[2] By 5:30 a.m., the agents at petitioner's home had learned of the marijuana seizure and sought the assistance of additional agents. About an hour later, after two more D.E.A. agents had arrived, the agents knocked at the front door of petitioner's residence, identified themselves, and announced their purpose (Tr. 673-675). Susan Flickinger opened the door, and the agents entered and arrested petitioner, his wife and Munier (Tr. 675-676; S. Tr. 92-93). After petitioner had been advised of his *Miranda* rights but before the agents could ask him any questions, petitioner remarked (Tr. 677): "Look, you've got me. I'm guilty, okay? But don't bust Susan. She doesn't known anything about this. She doesn't know anything about my business. She doesn't know why I've been flying in and out of Mexico." Petitioner also told the agents his source of supply and explained how he had landed his aircraft on the dry lake bed without lights (Tr. 678, 853-856).

Petitioner, his wife and Munier were taken to the federal building, while other agents remained at the residence to await the arrival of a search warrant, which

[2]"Tr." refers to the trial transcript.

was obtained that afternoon (Tr. 679). A search of the house pursuant to the warrant produced an aeronautical map, with the Hidden Hills Dry Lake area encircled in pencil (Tr. 726, 681-682). A subsequent search of petitioner's airplane uncovered marijuana debris (Tr. 876), and a search of petitioner's person after his arrest uncovered a Mexican travel permit.

ARGUMENT

1. Petitioner, presumably seeking suppression of his post-arrest admissions, argues (Pet. 6-7) that the district court erred in finding that the agents' entry into his residence to effect a warrantless, probable cause arrest was supported by exigent circumstances.[3] This claim is insubstantial.

It is an unsettled question "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." *Gerstein* v. *Pugh*, 420 U.S. 103, 113 n. 13. See also *United States* v. *Watson*, 423 U.S. 411, 418 n. 6; *United States* v. *Reed*, 572 F. 2d 412 (C.A. 2). There is no dispute, however, that the absence of a warrant may be justified by exigent circumstances. See *Roaden* v. *Kentucky*, 413 U.S. 496, 505; *Johnson* v. *United States*, 333 U.S. 10, 14-15; *United States* v. *Gardner*, 553 F. 2d 946, 947-948 (C.A. 5), certiorari

[3]The court of appeals correctly concluded that petitioner's arrest was lawful. But even if the arrest had been invalid, that would not necessarily require suppression of petitioner's post-arrest statements, made after he had received *Miranda* warnings. See *Brown* v. *Illinois*, 422 U.S. 590, 603-604; *United States* v. *Ceccolini*, No. 76-1151, decided March 31, 1978. No other evidence was attributable to the arrest entry, since the agents waited until a warrant had been procured before searching petitioner's house. See *United States* v. *Delguyd*, 542 F. 2d 346, 350-352 (C.A. 6). Compare *Mincey* v. *Arizona*, No. 77-5353, decided June 21, 1978, slip op. 7.

denied, No. 77-416, January 9, 1978. See also *Mincey* v. *Arizona*, No. 77-5353, decided June 21, 1978, slip op. 6. Moreover, as the court below properly pointed out, "exigency does not evolve from one single fact [but turns on] the totality of the circumstances * * *" (Pet. App. 8a-9a). So viewed, the facts of this case provided a sufficient basis for a finding of exigency.

To begin with, as petitioner concedes (Pet. App. 8a), at the time of the entry the agents clearly had probable cause to believe that petitioner had imported a substantial amount of marijuana into the United States only a few hours earlier and was then present in his home, probably in possession of large quantities of the easily disposable drug: based on their earlier surveillance, the substance of the overheard radio conversations, and the timing of the arrival and departures of the vehicles and airplane, "the D.E.A. agents could reasonably believe that the two vehicles leaving the lake bed contained contraband" (Pet. App. 10a), and petitioner's Suburban, one of the two vehicles that had met the plane carrying the marijuana, was parked in front of petitioner's home. Additionally, there was a significant danger that petitioner's confederates, who had just been arrested in possession of the illegally imported marijuana, or other co-conspirators (whose identities were unknown), would telephone or otherwise attempt to contact petitioner to warn him of the government's surveillance (Tr. 702) or that "a concerned prospective recipient [of the marijuana] might alert [petitioner] that the delivery was overdue and thus had possibly been intercepted" (Pet. App. 13a). Petitioner's training as a pilot and his access to an airplane heightened the risk of escape (Tr. 684).

Trafficking in controlled substances particularly requires a prompt law enforcement response. As Judge Friendly has observed in sustaining a warrantless drug

arrest in the defendant's home, "agents are entitled to use their knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic * * *." *United States* v. *Manning*, 448 F. 2d 992, 998-999 (C.A. 2) (*en banc*), certiorari denied, 404 U.S. 995. Accord, *United States* v. *Davis*, 461 F. 2d 1026, 1031-1032 (C.A. 3) ("Because of the speed with which narcotics can be dispersed or destroyed, agents must be able to move as quickly as possible. * * * [W]henever the Government attempts to control narcotics and narcotics peddlers, it is dealing with a type of exigent circumstance, the disappearance of evidence or contraband, long recognized as creating an exception to the need for an arrest or search warrant.") Moreover, while there was no evidence in this case that petitioner was actually armed, it was reasonable for the agents to believe that he might have had a gun in his house, given the common experience that large scale drug dealers often employ weapons. Indeed, the agents testified that they were concerned for their safety and feared that the occupants of petitioner's home were armed (Tr. 700-701, 706). The presence of multiple suspects in the house increased the dangers facing the agents.

In short, there was a significant possibility that petitioner would escape or destroy evidence unless the D.E.A. agents acted expeditiously. See, *e.g.*, *Ker* v. *California*, 374 U.S. 23, 40; *United States* v. *McLaughlin*, 525 F. 2d 517, 521 (C.A. 9), certiorari denied, 427 U.S. 904; *United States* v. *Bustamante-Gamez*, 488 F. 2d 4, 8 (C.A. 9), certiorari denied, 416 U.S. 970; *United States* v. *Rubin*, 474 F. 2d 262, 268-270 (C.A. 3), certiorari denied

sub nom. Agran v. *United States*, 414 U.S. 833. The agents' decision to arrest petitioner therefore was a reasonable response to a fast developing chain of events in the early hours of the morning.[4]

2. Petitioner argues (Pet. 7-8) that the court of appeals erred in applying a "clearly erroneous" standard to review the district court's finding of exigent circumstances. We note at the outset that the court below did not state that it would have disagreed with the trial judge if it had decided the exigent circumstances question *de novo*. Moreover, for the reasons outlined above, the district court's determination was plainly correct. Hence, this issue appears to be only of academic importance in the context of this case.

In any event, while the matter is not free from doubt, the weight of authority supports the court of appeals' decision. Although the "exigent circumstances" determination to some extent involves a mixed question of fact and law, it involves the sort of case-specific issue, like the voluntariness *vel non* of a defendant's confession or consent to search, in which deference should be given to the "fact-finding tribunal's experience with the

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[4]There is a strong similarity between this case and the cases applying the doctrine of "hot pursuit." While in a literal sense there was no "chase" here, there was no chase in *Warden* v. *Hayden*, 387 U.S. 294, where the suspect was already inside his home when the officers learned of his whereabouts. Nor was there a "chase" in other recent cases applying the "hot pursuit" doctrine. See, *e.g.*, *United States* v. *Scott*, 520 F. 2d 697, 699-700 (C.A. 9), certiorari denied, 423 U.S. 1056; *United States* v. *Holland*, 511 F. 2d 38, 43-44 (C.A. 6), certiorari denied, 421 U.S. 1001; *United States* v. *Holiday*, 457 F. 2d 912, 914 (C.A. 3), certiorari denied, 409 U.S. 913; *United States* v. *Rose*, 440 F. 2d 832, 834 (C.A. 6), certiorari denied, 404 U.S. 838. Cf. *United States* v. *Easter*, 552 F. 2d 230, 233 (C.A. 8); certiorari denied, 434 U.S. 844; *United States ex rel. Cardaio* v. *Casscles*, 446 F. 2d 632, 637-638 (C.A. 2).

mainsprings of human conduct." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289. See *United States* v. *Bradshaw*, 515 F. 2d 360, 364-365 (C.A. D.C.), reversed on other grounds *en banc sub nom. United States* v. *Robinson*, 533 F. 2d 578, certiorari denied, 424 U.S. 956; *United States* v. *Gargotto*, 510 F. 2d 409 (C.A. 6), certiorari denied, 421 U.S. 987. This Court and the lower courts therefore have repeatedly held that a trial judge's determination of matters such as these—even if they should not be accorded the same degree of deference as a credibility determination—should not be disturbed unless clearly erroneous. See, *e.g.*, *Campbell* v. *United States*, 373 U.S. 487, 493 (producibility of interview reports under the Jencks Act); *Davis* v. *United States*, 328 U.S. 582, 593 (voluntariness of a consent to search); *United States* v. *McCaleb*, 552 F. 2d 717, 720-721 (C.A. 6) (same); *United States* v. *Lemon*, 550 F. 2d 467, 472 (C.A. 9) (same); *United States* v. *Woodward*, 546 F. 2d 576 (C.A. 4) (search not the result of allegedly unlawful surveillance); *United States* v. *Jackson*, 544 F. 2d 407, 410 (C.A. 9) (abandonment of property); *United States* v. *Quinn*, 540 F. 2d 357, 361 (C.A. 8) (prejudice to the defendant from pre-indictment delay). See generally *United States* v. *Hart*, 546 F. 2d 798, 801-802 (C.A. 9), certiorari denied *sub nom. Robles* v. *United States*, 429 U.S. 1120; *United States* v. *Tallman*, 437 F. 2d 1103, 1104-1105 (C.A. 7); *Jackson* v. *United States*, 353 F. 2d 862, 864-865 (C.A. D.C.). After observing the witnesses and hearing the evidence at the suppression hearing, the district court was in by far the best position to judge whether the agents' swift action was reasonable in the circumstances of this case. Since the court of appeals found the issue to be a close one, it properly concluded not to disturb the lower court's determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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